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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~858~~ 53

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Dated May 14, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 858

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Opinion Below.

The opinion of the Court of Appeals for the Seventh Circuit (Appendix to Petition, pp. 18-56) is reported in 227 F. 2d 825.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

The question here presented is not correctly stated in the Petition.

The Commission found that respondents and other manufacturers of lead pigments conspired to adopt the zone method of pricing.[1] There was no charge in the complaint, no testimony and no finding that the individual use of zone pricing constituted an unfair method of competition. The question presented, thus, is whether, under the "unfair methods of competition" clause of Section 5 of the Federal Trade Commission Act, the Commission may compel sellers to give up a method of pricing, not charged or found to be illegal, on the theory that such is necessary to make the order prohibiting continuation of the alleged conspiracy effective.

The Commission asserted that the prohibition of the individual use of the zone method of pricing was necessary in order to insure that respondents would not continue to employ the same method of pricing alleged to have arisen through collusion, by claiming that the continued use was merely the result of individual choice rather than conspiracy. This feature of the case also involves another question. This, as the Court below pointed out (227 F. 2d at 843-844; Appendix to Petition, pp. 55-56), is whether the Commission, by an anticipatory order, may seek to raise an issue which could properly arise only in some future enforcement proceeding seeking compliance with the Commission's order prohibiting concert of action.

Statutes Involved.

The pertinent provisions of Section 5 (a) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U. S. C. § 45) are set forth in the Petition at pages 3-4. Section 5 (b) of the same Act provides in part as follows (15 U. S. C. § 45):

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[1] Respondents here have filed a cross petition for a writ of certiorari (No. 877) in which, among other things, they seek review of the affirmance of that portion of the Commission's order relating to the conspiracy issue.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. *The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint.* * * * The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." (Emphasis supplied.)

Section 9 of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. § 1008) provides that:

"In the exercise of any power or authority—

"(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

Statement of the Case.

Count I of the amended complaint alleged that respondents and other manufacturers of lead pigments had conspired to establish uniform zone delivered prices in violation of Section 5 of the Federal Trade Commission Act. Paragraph eight of the amended complaint alleged that each respondent adopted certain zone methods; paragraph nine alleged that each respondent adopted certain terms and conditions of sale; and paragraph ten alleged that each of the companies employed the zone method and other uniform terms and conditions of sale for the purpose and with the effect of enabling them to match their prices (R. 67-72).

The Trial Examiner in his recommended decision concluded that Count I related only to conspiratorial action (R. 3452-53).[2] Counsel for the Commission excepted to the failure of the Trial Examiner to hold that paragraphs eight to ten of the amended complaint charged individual use of the zone method as a violation of the Federal Trade Commission Act, separate and apart from the issue of conspiracy (R. 3559).

In ruling on this exception the Commission stated (R. 3709-10):

> "The Commission does not so construe the amended complaint. The manner in which this document was prepared makes it apparent that Paragraphs Eight and Nine of Count I were intended to allege, in effect, that pursuant to and in furtherance of the conspiracy alleged in general terms in Paragraph Seven, each of the respondents used the zone methods of selling therein described, and that each of the respondents employed certain terms and conditions in sell-

[2] Count I also alleged that National Lead individually had attempted to monopolize the lead pigments field and the Commission's order contained an injunction against future acquisitions by National Lead (R. 3802). That issue, however, is no longer in the case, since the injunction against National Lead was set aside by the Court below (227 F. 2d at 837-39; Appendix to Petition, pp. 40-44) and no review of that action is sought by the Commission.

ing their lead pigments. Paragraph Ten alleges that each of the respondents used the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine 'for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves', thus indicating that the allegations of Paragraphs Eight and Nine are not a charge in addition to the conspiracy but constitute only a description of the manner in which the conspiracy previously referred to was effectuated; and all doubt on the point is removed by the allegations of Paragraph Twelve (conclusion) to the effect that 'The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public', etc. *If it had been the Commission's intention to charge that the acts of each of the respondents individually were unlawful, it could and undoubtedly would have so alleged in clear and unambiguous terms.* The hearing examiner's statement of the issues was not erroneous in the respect mentioned, and this exception is denied." (Emphasis supplied.)

In a further ruling on another exception filed by Commission's counsel, the Commission said (R. 3719):

"Counsel's request for a provision prohibiting each of the respondents from selling its lead pigments in accordance with a zone delivered price system is based upon his argument, made in support of his exception No. I, that the amended complaint charges, and the proof supports the charge, that each of the respondents individually has violated the Federal Trade Commission Act through the use of the zone pricing system. As shown by the ruling on exception No. I, the Commission does not consider this to be one of the charges of the complaint. Thus, the

> Commission does not agree with counsel in his position that the order to cease and desist should contain any provision based on that theory. The Commission is of the opinion, however, in view of all of the facts and circumstances in the case, that in order to effectively prevent the respondents from continuing to attain certain of the objectives of their unlawful conspiracy and so continue to deprive the purchasers of lead pigments of the advantages of real price competition among the producers it is necessary for each of the respondents to be restrained from continuing to use the zone delivered price system and from using any other similar system for the purpose or with the effect of matching the prices of other lead pigment producers."

The Commission made detailed findings of fact (R. 3732-97) and its order, in addition to prohibiting conspiracy or concert of action, enjoined each respondent individually from employing a zone delivered price method "for the purpose or with the effect of systematically matching" the prices of any other seller of lead pigments (R. 3801).

In its opinion the Commission said that this injunction was necessary in order to make the order against conspiracy effective, to eliminate the effects of the conspiracy and to guarantee against its continuation (R. 3814-15). It also said that unless the respondents individually were enjoined from using a zone method, the order prohibiting continuation of the conspiracy "may well be a useless gesture"; that the evils resulting from the conspiracy "may well continue indefinitely"; and that respondents might continue to employ the same method by claiming that such use was not the result of conspiratorial action (R. 3815, 3816).

The Court below, in setting aside this part of the Commission's order, held that the Commission had the statutory authority to prohibit only illegal practices and that here "there have been no complaint, no hearing and

no findings relative to the effect of such parallel individual actions" (227 F. 2d at 843; Appendix to Petition, p. 55).

The Court below also said (227 F. 2d at 843-44; Appendix to Petition, pp. 55-56):

> "Clearly, the Commission was concerned here with enforcement of its order prohibiting concerted action. In justifying the paragraph in question, it pointed up 'the likelihood' that petitioners might continue to use the same zone systems and plead that they have abandoned the unlawful agreement and that such use is merely individual parallel conduct. It seems to us that this is an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this court to consider should some future enforcement proceeding become necessary. *We refuse to sustain such a sweeping inroad on individual liberty of competitive action, without a prior determination by the Commission, after an appropriate hearing, that such activity is a violation of the Act.* Lawful acts do not become automatically unlawful because of an administrative guess that a declaration of their illegality may facilitate enforcement of a valid order.
>
> If individual use of the zone system by petitioners is to be restrained, that result must be achieved by a proper order in a proceeding conducted in conformity with the statute, in which the invalidity of such conduct is determined. The Commission's power to act is conditioned on such a determination." (Emphasis supplied.)

Argument.

(1) The decision below was clearly correct.

The Court below properly decided, we submit, that the powers of the Commission are to be construed in the light of the Act which gave it birth. We do not have here the

question of whether the Commission is to be allowed discretion in its choice of a remedy to deal with an illegal practice (Petition, pp. 10-16). Rather the question here is whether the Commission, on the unfounded assumption that its order enjoining concert of action will probably be evaded, may prevent respondents individually from employing a *lawful* pricing method.[3]

We had thought that it was settled by a long line of authorities, as the Court below held, that the Commission is limited to uprooting practices found by it to be illegal within the meaning of the Federal Trade Commission Act or the Clayton Act (227 F. 2d at 840-44; Appendix to Petition, pp. 47-50).[4] Of course, in so doing, the Commission is not restricted to the precise illegal practice charged in the complaint; it may also reach related illegal practices.[5] But it has no authority, we submit, to condemn practices which do not constitute violations of either statute.

Here the Commission purported to act under Section 5 of the Federal Trade Commission Act. Section 5 (a) of the Federal Trade Commission Act (Petition, p. 3) declares unfair methods of competition to be unlawful and subsection (6) thereof directs the Commission to prevent persons and concerns "from using unfair methods of competition" (ibid.). Section 5 (b) provides the procedure to be followed in carrying out this direction. The Commission must issue a complaint stating in what way a particular practice constitutes an unfair method of competition; the respondent may appear and contest the violation of law "so charged"; a hearing is to be held; the Commission must

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[3] In reality the point at issue will arise only if, at some future date, respondents' compliance with the decree of the Court below is challenged in that Court. See p. 13, *infra*.

[4] *Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587, 598; *F. T. C.* v. *Eastman Kodak Co.*, 274 U. S. 619, 623-24; *F. T. C.* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-76; *Salt Producers' Ass'n* v. *Fed. Trade Comm'n*, 134 F. 2d 354 (7th Cir.). Cf. *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 727-28. Section 9 of the Administrative Procedure Act (*supra*, p. 3) represents Congressional recognition of the limited nature of the powers granted to administrative agencies.

[5] See, e.g., *Hershey Chocolate Corp.* v. *F. T. C.*, 121 F. 2d 968 (3rd Cir.).

find that the practice constitutes a method of competition prohibited by the Act; the Commission must state its findings in writing; and finally the Commission must issue an order directing the respondent to cease and desist "from using *such* method of competition" (i.e. such *unfair* method).

The statutory provisions are, therefore, unambiguous and specific. The complaint must charge an unfair method of competition; hearings must be had upon this issue; and the Commission must find that the practice involved is an unfair method of competition (see pp. 2-3, *supra*).

Concededly here none of these conditions was met. Under its own interpretation of the amended complaint, the Commission did not charge that the individual use of the zone pricing method constituted an unfair method of competition (*supra*, pp. 4-6); no testimony was taken on this score; and the Commission made no finding that such individual use was an unfair method of competition.

We do not dispute the fact that in dealing with illegal acts the Commission has a broad discretion in its choice of a remedy. We merely say that the Commission has no power to enjoin a practice unless and until it properly finds that such practice constitutes a violation of law and certainly it has no such power when it has refused to make such a finding.

The "choice of remedy" cases cited in the Petition (pp. 11-15) have no application whatever, we submit, to the point at issue. None of them upholds the power of an administrative agency to enjoin lawful action.

The Commission argues (Petition, p. 15) that the test applied in the *Siegel* and *Ruberoid* cases[6] "necessarily means that the Commission's order may embrace conduct *other than* 'the unlawful practices found to exist.'" Even if we were to accept that statement, it cannot mean that the Commission's order may ban *lawful* conduct in addition

[6] *Siegel Co.* v. *Trade Comm'n*, 327 U. S. 608; *Fed. Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470.

to the specific illegal practices found to exist. In our view, neither case stands for that proposition.

In the *Siegel* case this Court remanded the case so that the Commission might determine whether the company's trade name "Alpacuna" could with qualifying language be used in a non-deceptive manner. Implicit in this decision is the principle that the Commission cannot, by a sweeping order, prevent lawful conduct.[7]

The *Ruberoid* case is to the same effect. The order there prohibited only illegal price discriminations. While the evidence before the Commission concerned price differentials of 5% or more, the Commission expressly found that very small price differentials had a material effect on competition. Hence this Court refused to modify the order to allow price differentials of less than 5% and thereby permit the selling company to charge competing purchasers illegal discriminatory prices (343 U. S. at 473-74). With respect to the company's contention that the order prohibited lawful price differentials (viz., price differentials which were cost-justified or made in good faith to meet equally low prices of competitors), this Court said that the provisos of Section 2 (a) and (b) of the Clayton Act were "necessarily implicit" in the order (343 U. S. at 475-76). The decision thus emphasizes that the Commission has the power to suppress only illegal practices.

The Commission's position similarly finds no support in the other cases cited in the Petition. Indeed, they again point up the fact that orders of an administrative agency must fall within the powers granted by Congress. In *May Stores Co.* v. *Labor Board*, 326 U. S. 376, 392-93, this Court struck from the Board's order a broadly worded paragraph (prohibiting only illegal conduct, it may be noted) which bore no reasonable relation to the specific illegal practices found to exist. *I. A. of M.* v. *Labor Board*,

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[7] In *Fed. Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 455, the Commission's order was modified so as specifically to permit individual lawful acts which might otherwise be prohibited under the terms of the order. Cf. *Fed. Trade Comm'n* v. *A. P. W. Paper Co.*, 328 U. S. 193.

311 U. S. 72, simply involved the right of the Board to order an employer to bargain exclusively with a particular union, a power granted to the Labor Board under Section 10 of the National Labor Relations Act.[8]

Here the illegality found to exist consisted of the alleged *agreement* among respondents and other manufacturers to establish uniform prices within uniform price zones. Zone methods as such were not under attack. Indeed, the Commission concedes that each respondent individually can legally employ its own zone method (Petition, p. 10, footnote 2).

We believe that it is significant, as the Court below noted, that this Court, in *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 727-728, "carefully pointed out" that the Commission's order, prohibiting a conspiracy to use a basing point system, "did not affect individual use of such system" (227 F. 2d at 843; Appendix to Petition, p. 53).

The Commission seeks to distinguish *Salt Producers Ass'n* v. *Fed. Trade Comm'n*, 134 F. 2d 354 (7th Cir.), from the case at bar, but we submit that the Court below was correct in stating that "the two cannot be distinguished in principle" (227 F. 2d at 843; Appendix to Petition, p. 55). In *Salt Producers* the Commission sought to enjoin the individual use of any zone system "whereby the cost of salt delivered to buyers within each respective zone is made identical." Here the paragraph of the order rejected by the Court below sought to enjoin the individual use of

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[8] Section 10 (c) of the National Labor Relations Act (61 Stat. 147, 29 U. S. C. § 160 [c]) provides that the Board may prohibit unfair labor practices with a further provision that its order may require a person engaged in such practices "to take such *affirmative action* * * * as will effectuate the policies of this Act." (Emphasis supplied.) Section 5 of the Federal Trade Commission Act contains no equivalent provision.

The other cases cited in the Petition are similarly inapplicable. *Individual Directory Corp.* v. *Federal Trade Comm'n*, 188 F. 2d 468, concerned an order prohibiting a deceptive practice. *Consumer Sales Corp.* v. *Fed. Trade Comm'n*, 198 F. 2d 404 (cert. denied 344 U. S. 912), and *Hershey Chocolate Corp.* v. *Fed. Trade Comm'n*, 121 F. 2d 968, involved the power of the Commission to enjoin illegal activities related to those charged in the complaint.

any zone method where the purpose *or* effect was to match prices of others sellers. In *Salt Producers* the Commission argued that it had the power to prevent continued use of the "very device" (i.e. the zone method) which created the uniform prices resulting from the salt manufacturers' admitted conspiracy. In that case, as here, there was no charge in the complaint and no finding that the individual use of a zone method was an unfair method of competition and in both cases the Court of Appeals held that under these circumstances the Commission was without power to prohibit the individual use of that system of pricing.[9]

We submit, therefore, that the decision below was correct and that the Commission's contentions find no support in reason or authority.

(2) There is no conflict of decision.

Contrary to the Commission's contention (Petition, p. 14); there is no conflict between the decision below and this Court's decision in the *Ruberoid* case (*supra*, p. 10). Furthermore, that case, as well as the others discussed in the preceding section of this brief, clearly indicates that the Commission may prohibit only illegal conduct. Neither *Ruberoid* nor any of the other cases cited in the Petition lends support to the Commission's position.

We know of only one case in which a reviewing court affirmed a Commission order prohibiting the individual use of a delivered price method, *Triangle Conduit & Cable Co.* v. *Fed. Trade Comm'n*, 168 F. 2d 175 (7th Cir.). There, however, the complaint contained two counts: the first charging a conspiracy to use a basing point system, and the second alleging that the individual use of that system by each company with knowledge of the others'

[9] In this proceeding, where there is a large multiple-plant producer, National Lead, and several smaller producers, the smaller producers should not be handicapped in their choice of any pricing method necessary to meet the competition of their larger rival. See dissenting opinion of Commissioner Mason (R. 3840-41).

use was an unfair method of competition. In addition, the Commission specifically found that such individual use constituted an unfair method of competition.[10] This Court affirmed in a per curiam opinion representing an equally divided Court with Mr. Justice JACKSON not participating (*sub nom. Clayton Mark Co.* v. *Fed. Trade Comm'n*, 336 U. S. 956).

There is thus presented no conflict in any decision of this Court or any other Court of Appeals.

(3) There is no important question of Federal law involved.

In the present posture of the case the Commission's principal asserted justification for the injunction against individual use of a zone method—to prevent evasion of the order prohibiting conspiracy—is based upon a premature fear of a situation that may never arise.

It is self-evident that if the Commission's order enjoining the alleged conspiracy be permitted to stand,[11] respondents individually will be compelled to change their respective methods of pricing. If and when that occurs, it will be appropriate for the Commission to consider whether, in the light of the situation as it then exists, there is any question of evasion of the order prohibiting conspiracy. If at that time there is any necessity to modify the order to prevent evasion, the Court below would clearly have the power to do so.

Thus there is no real question of law at this time before the Court. As the Court below said, this portion of the Commission's order "is an unwarranted anticipation of a

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[10] A spokesman for the Commission subsequently stated that, in his opinion, the second count in the *Triangle Conduit* case was "equivalent" to a charge of conspiracy. Sen. Doc. No. 27, 81st Cong., 1st Sess., 63 (1949). Under these circumstances, therefore, it is clear that the Commission at that time felt that no order could have been entered without a specific count in the complaint directed at individual parallel action. Here, of course, there was no such separate charge.

[11] See cross petition for a writ of certiorari filed by the respondents (No. 877).

situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this Court to consider should some future enforcement proceeding become necessary" (227 F. 2d at 844; Appendix to Petition, p. 55).

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Dated May 14, 1956.

Respectfully submitted,

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